



## **OPPOSITION TO MOTION FOR PARTIAL SUMMARY DECISION**

Pursuant to 47 C.F.R. § 1.251(b), Environmental, LLC, Intelligent Transportation and Monitoring Wireless, LLC and Verde Systems, LLC (collectively “SkyTel-O”)<sup>1</sup> by undersigned counsel, hereby file their Opposition to Maritime Communications/Land Mobile, LLC’s (“Maritime”) Motion for Partial Summary Decision (“Motion”). Maritime’s Motion seeks a summary determination that authorizations listed in Exhibit 1 (referred to as the “Watercom Licenses”), attached to its Motion, initially issued to Waterway Communications System, Inc. (“Watercom”) were constructed in compliance with Sections 1.955(c) and 80.49(a) of the Federal Communications Commission’s (“FCC” or “Commission”) rules. Maritime also seeks a partial summary decision with respect to the authorizations listed in its Exhibit 2. Maritime voluntarily submitted these so-called incumbent AMTS authorizations for cancellation or deletion as they are alleged to be entirely subsumed within geographic licenses held by Maritime (“Subsumed Licenses”). Therefore, Maritime claims that Issue G (whether Maritime timely constructed or operated any of its stations in defiance of Sections 1.955(c) or 80.49(a) of the FCC’s rules) is therefore moot as to the Subsumed Incumbent Licenses.

For the reasons stated herein, SkyTel-O respectfully requests that the Judge deny the Motion.

### **I. FACTS**

*In the Matter of Applications of Waterway Communications System, Inc. For Renewal of Automated Maritime Telecommunications System Station Licenses WHG 700–WHG 703 and WHG 705–WHG 754, File Nos. 855083–855136, Memorandum Opinion and Order, 2 F.C.C.R.*

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<sup>1</sup> Undersigned counsel only represents Environmental, LLC, Intelligent Transportation and Monitoring Wireless, LLC and Verde Systems, LLC (commonly referred to as the “SkyTel-O entities”). This filing is not made on behalf of Mr. Warren Havens or any entity other than the SkyTel-O entities. The undersigned only represents the SkyTel-O entities. This undersigned does not represent Mr. Havens or any other entities with which he is connected.

7317 (1987) (“Order”) does not unequivocally conclude that the stations were timely constructed for multiple reasons.

- The Order was not a fact finding proceeding.
- The Order does not involve a review of Maritime evidence or even assertions of how Maritime met its construction obligations.
- The Order does not specifically find that the Watercom stations were lawfully constructed (e.g., providing the required coverage, interconnection and meeting requisite construction deadlines under FCC rules).
- Watercom’s Licenses were not timely constructed in accordance with Sections 1.955(c) and 80.49(a).
- Maritime has not properly maintained records relating to the operation of its licensed stations.
- Maritime has failed to produce records that demonstrate its construction and operation in compliance with Commission rules.
- Maritime has concealed records relating to construction of the Watercom Licenses.
- The issue of whether the Watercom systems and component stations were timely constructed<sup>2</sup> is pending before the Wireless Bureau in two proceedings involving SkyTel entities and Maritime.

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<sup>2</sup> Hererin, “timely construction” and “construction” means both timely and in accordance with the licenses’ and rule requirements on technical matters and Interconnection (these AMTS systems were and still are all CMRS). Simply to “construct” something by the deadline is not timely construction. The principal technical requirement of all AMTS site based license construction was to meet the “continuity of coverage” requirement under rule §80.475(a) (1999).

- The Motion's supporting evidence, the declaration of Mr. Smith, states that the construction of the subject stations was not completed at the construction deadline, but decades later in years 2005-2006.<sup>3</sup>

Moreover, in the past, Maritime has affirmatively represented no documents exist that are responsive to the issue of whether stations to operate certain radio frequencies have been constructed or, if constructed, have been operated on a continuous basis. For example, in August 2011, Maritime filed its Opposition to Petition to Dismiss, Petition to Deny, or in the Alternative Section 1.41 Request, to a pleading, which had been filed earlier by Warren Havens, Verde Systems, LLC, Intelligent Transportation & Monitoring Wireless LLC; Telesaurus Holdings GB LLC, V2G LLC, and Skybridge Spectrum Foundation, with respect to File No. 0004738157. Maritime stated it had no need to obtain any documents related to those issues from Mobex (its predecessor in interest for the radio licenses) and, moreover, all of the old Mobex documents had been placed into storage and were "all destroyed years ago by the storage company" when Mobex ceased paying rent for document storage. *See* Maritime Opposition at 3, Exhibit I, Declaration of David Predmore, at No. 5 and attachments to July 30, 2012 Request of Warren Havens to Appear at Prehearing Conference by Telephone.

Mr. Predmore was an officer of Mobex and represented he was told by the storage company the documents would be destroyed. However, he did not state that he made any present effort to determine whether the documents actually had been destroyed. As facts show, he was wrong. The documents exist.

In Maritime's February 6, 2012, Response to Interrogatories in EB Docket No. 11-71, Maritime stated as follows with respect to Interrogatory 23:

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<sup>3</sup> This fact alone justifies the denial of the Motion.

After acquisition of the AMTS assets by Maritime, many of the corporate and operational records of Mobex were placed by Mobex's David Predmore in archives with Nation's Capital Archives & Storage Systems, in Virginia. Some records were also stored by Mobex with a firm called Iron Mountain at facilities in Indiana. It is Maritime's understanding that the documents were destroyed when the storage fees fell into arrears. It is possible that some of these documents might provide further details regarding some of the responses herein.

John Reardon filed a declaration in support of Maritime's Response to Interrogatories, and stated that he had assisted with the preparation of the interrogatories and reviewed them for correction, asserting the facts were true and correct to the best of his personal knowledge. Yet, he too failed to make a simple inquiry to the record custodian to verify the correctness of his representations to the Commission and the parties to this proceeding.

SkyTel-O, not believing these statements from Maritime took the initiative to contact the custodian of Maritime's records, Nation's Capital Archives & Storage Systems ("NCASS"), to confirm Maritime's statements.

- NCASS informed SkyTel-O 93 boxes of documents remain extant.
- SkyTel-O obtained a subpoena *duces tecum* for the documents

When confronted by the reality the documents were not destroyed, Maritime quickly backtracked and admitted that the "destroyed documents" do indeed exist; thus, wasting time and resources for all. On May 9, 2012, Maritime's counsel emailed Ms. Pamela Kane of Enforcement Bureau stating "A substantial portion if not the majority of the documents may be in no way related to the matter in issue in EB Docket No. 11-71, but it is also possible and indeed likely that some portion of the documents may be relevant." In other words, documents responsive to discovery requests and relevant to this proceeding have always existed and could have and should have been produced earlier.

The record demonstrates Maritime made no reasonable effort to locate and produce documents responsive to discovery requests.<sup>4</sup> Further, Maritime and its predecessors in interest of these site-based system stations had an obligation they violated to maintain these station logs and records of construction and operation, under FCC rule §80.409. *See* 47 CFR § 80.409. It is incredulous to believe that a purchaser would not obtain and keep records of the assets it purchases. Thus, it is reasonable to conclude that Maritime does hold the records.<sup>5</sup>

Thus, it is likely that the documents will reveal facts germane to the issues underlying this proceeding. Documents further supporting the conclusion that material facts remain in dispute is likely. Maritime's blatant discovery violations justifies a finding that Maritime lacks credibility as to its factual assertions in this case, including in this Motion.

## **II. STANDARD OF REVIEW**

Per 47 C.F.R. § 1.251(d),

The presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and to the need for cross-examination, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision.

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<sup>4</sup> Parties have an obligation to make a reasonable search for requested documents. *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316, *slip op.* (3d Cir. March 16, 2012). A party or its attorney must make a reasonable search before objecting to a request to produce documents as overly burdensome. *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F.2d 1440, 1448, n.4 (11th Cir. 1985)(upholding the imposition of financial sanctions on an attorney who failed to make any reasonable search for responsive documents).

<sup>5</sup> it has stated under oath to only be in storage facilities it, someone, could not retrieve, but has flagrantly withheld these in this proceeding, violating the most fundamental due-process obligations and prejudicing SkyTel and the Enforcement Bureau, and proper adjudication in this matter.

**III. MARITIME'S MOTION IS PREMATURE AND DEFECTIVE AS DISCOVERY REMAINS ONGOING AND PROCEEDINGS ON THE SUBJECT CONSTRUCTION ISSUE ARE PENDING BEFORE THE WIRELESS BUREAU**

Section 1.251(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.251(a), imposes a high burden on an applicant which seeks summary decision. Hence, the rule provides that the party filing the motion may not simply rely upon mere allegations or denials, but must affirmatively demonstrate by affidavit or by other materials, that there is no genuine issue of material fact for determination at the hearing. Section 1.251(a)(1), 47 C.F.R. § 1.251(a)(1).

As the moving party, Maritime has the burden of establishing that a favorable summary decision would be appropriate based on the pleadings and the papers submitted. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). Maritime has not carried its burden and a summary decision would be inappropriate.

Maritime's Motion is premature in light of the ongoing discovery. It would be improper at this stage to grant the Motion given the pending discovery.<sup>6</sup> There can be no dispute that discovery will likely yield additional disputed facts necessitating a denial of the Motion. Therefore, a summary decision at this stage would impermissibly deprive the parties to this proceeding of the right to utilize the discovery process to discover facts that support the denial of the Motion. *Compare* treatment of summary judgment under the Federal Rules of Civil Procedure, Rule 56. "Summary judgment should not be granted where the non-moving party has not had the opportunity to discover information that is essential to his opposition." *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521-22 (10th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). "The protection afforded by Rule 56(f) is ... designed to safeguard against a premature or improvident grant of summary

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<sup>6</sup> Both written and oral discovery is pending. Indeed, pursuant to the Judge's Order, discovery remains open until November 26, 2012. *See* FCC-12M-26, footnote 1, dated May 23, 2012.

judgment.” *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986) (quoting 10A Wright, Miller & Kane, Federal Practices and Procedure 2740 (1983); *see e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Therefore, the Judge must deny the Motion as premature and permit further discovery to allow the parties to discover central facts.<sup>7</sup>

Importantly, the Hearing Designation Order (“HDO”) identifies this as a fact-finding hearing, including with respect to Issue G. *See, Maritime Communications/Land Mobile, LLC, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing* (FCC 11- 64), 26 FCC Rcd 6520, 6547 ¶ 62(g) (2011).<sup>8</sup> As a result, the Judge must allow fact-finding to continue through the process of discovery before ruling on key issues.<sup>9</sup>

SkyTel-O challenged the “Watercom” systems and component stations subject of the instant motion before the Wireless Bureau, resulting in several Orders now pending on appeal. *See Memorandum Opinion and Order*, FCC 10-9, rel. January 14, 2010 (SkyTel entities timely filed a *Petition for Reconsideration Based on New Facts*, which remains pending); *Memorandum Opinion and Order*, FCC 10-30, rel. March 16, 2010 (SkyTel entities timely filed a *Petition for Reconsideration Based Upon New Facts & in the Alternative Section 1.41 Request*, the petition remains pending). Both of these *MO&O* decisions and the appeals involve, *inter alia*, the issue of whether the subject Watercom systems and component stations were timely constructed in accordance with requirements stated in the relevant rules (including continuity of

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<sup>7</sup> In addition, Maritime’s Motion should be viewed as defective given the fact it neglected to set forth a discernible statement of undisputed facts upon which it bases its Motion.

<sup>8</sup> As the Commission indicated in the HDO FCC 11-64, the SkyTel entities (therein called “Petitioners”) submitted various and extensive petition pleadings challenging Maritime: these included what the HDO summarized as issue (g). It was because of these SkyTel petitions that issue (g) arose, and the Commission properly established a fact finding hearing on this issue. Maritime is seeking, by the instant Motion, to avoid this fact, and in effect is asking the judge to cut out this Commission determination. Maritime could have sought reconsideration before the Commission in this regard, but did not.

<sup>9</sup> SkyTel-O informed Maritime that the Maritime-Mobex-Watercom records of “construction” and operations will soon be examined. This suggests that Maritime prematurely filed the instant action because it fears the facts that will be revealed during this review.



coverage, Interconnection, etc.). Moreover, this “construction” issue involves an interpretation of rules (including the rule on “continuity of coverage,” §80.475(a) (1999) that the Commission and the Wireless Bureau may undertake, but which is not subject to adjudication in this Hearing.<sup>10</sup> The pending proceedings should preclude the grant of this Motion.<sup>11</sup>

#### **IV. SUMMARY DECISION IS NOT WARRANTED BECAUSE THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS**

##### **A. The Issue of Watercom’s Construction is Subject to Appeal**

Maritime attempts to paint the issue of construction of the Watercom Licenses as conclusively determined by a single FCC decision granting renewal of the Watercom Licenses.<sup>12</sup> That conclusion cannot be drawn. First, the cited order does not unequivocally conclude that the stations were timely constructed. In particular, the statement highlighted by Maritime in fact only identifies the construction requirement, but does not go so far as to conclude that Maritime met its construction responsibilities.<sup>13</sup> The Order does not involve a review of Maritime evidence or even assertions of how Maritime met its construction obligations. Nor did the Commission, in the Order, specifically find that the Watercom stations were lawfully constructed

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<sup>10</sup> See 47 C.F.R. § 0.151 compared with 47 C.F.R. § 0.131. Rule interpretation may be undertaken by the Wireless Telecommunications Bureau, 47 C.F.R. § 0.131 or the full Commission. Any rule interpretation, if needed, may be referred to the Chief of the Wireless Telecommunications Bureau for a ruling under 47 C.F.R. §1.2. See, e.g., *In the Matter of Motions for Declaratory Rulings, FCC 99-160*, 14 FCC Rcd 12752 [declaratory Ruling requests referred by the Office of General Counsel to the Wireless Telecommunications Bureau where the Bureau had the delegated authority, the questions concerned radio service rules, language terms and procedures, and no new or novel issues were involved]. In the two proceedings noted above, these matters including rule interpretations, are properly pending before the Wireless Bureau.

<sup>11</sup> This inappropriate timing of this Motion is further evidence that the Motion lacks candor in that it is a thinly veiled attempt to circumvent the pending proceedings.

<sup>12</sup> *In the Matter of Applications of Waterway Communications System, Inc. For Renewal of Automated Maritime Telecommunications System Station Licenses WHG 700–WHG 703 and WHG 705–WHG 754*, File Nos. 855083–855136, Memorandum Opinion and Order, 2 F.C.C.R. 7317 (1987).

<sup>13</sup> “Watercom was required to meet a schedule of construction, regularly kept us apprised of the status of construction and put the system into operation within the time we had allowed. So there can be no question of spectrum hoarding or other dereliction in its inauguration of service.” *Memorandum Opinion and Order* (FCC 87-373), 2 FCC Rcd 7317 at ¶ 14 (1987) (emphasis added).

(e.g., providing the required coverage, interconnection and meeting requisite construction deadlines under FCC rules). The issue remains open for factual determination herein.<sup>14</sup>

Second, that Order is not binding upon SkyTel-O or this proceeding. SkyTel-O did not participate in the proceedings that led to the Order. As a result, as a non-party to the proceeding, SkyTel-O is not bound by res judicata and may “introduce only new or additional evidence not adduced in the...proceeding upon an appropriate showing that such evidence would be relevant and material to a resolution of those issues.”<sup>15</sup> Maritime may, in turn, introduce rebuttal evidence, but only as to the new or additional evidence.<sup>16</sup>

Third, the timely construction of the system and Watercom’s (and later Mobex Communications, Inc. (“Mobex”), which acquired Watercom in 2000, and now Maritime), however, is a disputed fact at issue in this case. The issue of whether an FCC License has been timely constructed is an issue of fact. SkyTel-O disputes that Watercom’s Licenses were timely constructed in accordance with Sections 1.955(c) and 80.49(a).

Furthermore, as discussed more fully below, Maritime concealed records relating to the construction of the Watercom Licenses. These records have now been made available. As a result, new facts may be presented in the records that were not previously available to the

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<sup>14</sup> A recent example of the FCC properly investigating the issue of whether a site-based AMTS station was constructed, long after the construction deadline and renewals, is the Wireless Bureau section 308 investigation commenced recently with regard to Call Sign WQA216 (Paging Systems Inc.’s alleged station in New York City). Such investigations are proper where information arises that calls into question whether or not a station (or a system of stations) was ever constructed. Likewise, the Commission properly decided to include issue (g) with regard to all of Maritime site based stations based upon evidence presented by SkyTel in petitions. These petitions contained sufficient evidence to call into question whether these stations were timely and properly constructed, and kept in permanent operation.

<sup>15</sup> *RKO General, Inc.*, Order, 46 FCC 2d 246, 249 (1974).

<sup>16</sup> *Id.* at para. 6.

Commission when it ruled in the above matter. Thus, that matter is ripe for reconsideration, and should not be held to have any dispositive effect on the instant action.<sup>17</sup>

**B. New Evidence Previously Concealed by Maritime Renders Facts in Dispute**

All public coast station and system licensees must maintain records regarding the operation of each licensed station. *See* 47 C.F.R. § 80.409. The records must be made available to the Commission for inspection upon request. *Id.* Maritime, thus, was obligated to maintain station records and logs, in good order, at its place of business or system control point, for ready access to the FCC, including during all times of claims against the licensee or systems. Maritime has never sought a waiver of this requirement. Despite repeated demands, Maritime has failed to produce records that demonstrate its construction and operation in compliance with Commission rules. When the Watercom Licenses were assigned to Maritime in 2005, Maritime did not seek access to, or in any case did not obtain and maintain, the station logs and records that Mobex was required to keep per FCC rules. Instead, the records were put into storage at NCASS. Maritime made no request for copies of the records to maintain at its stations or in its offices. Inexplicably, on the record (before the Commission) Maritime has stated that it does not have any records relating to the Watercom Licenses transferred from Mobex.<sup>18</sup> Despite claims that no records exist, the records have now been made available for inspection at the storage facility. *See* Declaration of attorney Danny Ruhl attached hereto.

Because the records have been hidden to date, SkyTel-O has been unable to review them in order to determine whether it disputes the facts therein which allegedly demonstrate that the Watercom Licenses were timely constructed. It would be premature and improper to determine

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<sup>17</sup> Where a licensee has concealed material facts, the FCC is authorized to reopen a hearing. *See, e.g., RKO Gen., Inc. v. F.C.C.*, 670 F.2d 215, 231 (D.C. Cir. 1981).

<sup>18</sup> *See* Predmore Declaration, attached to July 30, 2012 Request of Warren Havens to Appear at Prehearing Conference by Telephone.

that no factual controversy exists without affording SkyTel-O and this tribunal the opportunity to review the records to determine whether they raise a controversy. Moreover, Maritime's lack of candor must call into question all of its assertions of fact.

**C. Maritime's Supportive "Evidence" is Insufficient to Demonstrate a Lack of Factual Controversy**

Maritime included with its Motion the Declaration of Robert T. Smith, an engineer who began his career with Watercom in 1987 and is currently employed by Maritime. *See* Exhibit 3 to Motion for Partial Summary Judgment. Mr. Smith claims that when he began his employment with Watercom, the Watercom Stations were constructed and in operation. *See Id.* at para. 4. This evidence is insufficient to conclusively demonstrate construction. Mr. Smith references no records, no facts and no other evidence to support his conclusory assertion that the stations were constructed at the time he commenced his employment with Watercom in 1987. Moreover, the extent of construction in 1987 is not at issue. Compliance with FCC rules requires construction at the construction deadline. *See* 47 C.F.R. § 80.49(a). Furthermore, the Smith Declaration must fail under the FCC's rules. Affidavits supporting summary decision must be made on the basis of personal knowledge. 47 C.F.R. § 1.251 (c). Mr. Smith's declaration does not rely entirely upon personal knowledge. Instead, he makes claims based upon secondhand "knowledge" that he "learned" from third parties. Mr. Smith's lack of personal knowledge cannot support a summary decision.

Finally and perhaps most importantly, Mr. Smith asserts that the Watercom system station construction *was not completed until years 2005-2006* which is some decades past the construction deadline. Accepting this fact, *the construction is untimely resulting in automatic termination.*

**V. THE ISSUE OF CONSTRUCTION IS NOT PROPER FOR SUMMARY DECISION BECAUSE THE DEFINITION OF “CONSTRUCTION” IS SUBJECT TO DISPUTE**

Even assuming a lack of material factual issues in dispute, summary decision on the issue of construction of the Watercom Licenses is not appropriate because the meaning of the term “construction” remains subject to dispute. And, it would be premature at this time to ascribe a meaning to the term for a number of reasons. First, as explained above, the Motion is premature given the pending appeals - Petitions for Reconsideration based on new facts. Second, the Judge has yet to adopt specific terms to govern this proceeding. On August 7, 2012 Judge Sippel requested that Maritime file a glossary of terms relevant to this proceeding.<sup>19</sup> Maritime filed its glossary on August 16, 2012. Both the SkyTel-O entities and the FCC’s Enforcement Bureau objected to the terms as construed by Maritime.<sup>20</sup> This clearly demonstrates that the term “construction” is subject to dispute. Because the core of Issue G is the timeliness of construction, the application of that term is critical to this matter. Moreover, Maritime’s glossary departs from accepted definitions under FCC rules, and thus, its interpretation of the terms for purposes of a summary decision must not be accepted.

Third, the specific “construction” requirements for ATMS licensees are subject to appeal. For example, a pending Petition for Reconsideration challenges a Bureau finding that failure to provide continuity of service, as required under Section 80.475(a), would not result in automatic termination because, for site-based stations, continuity of service was not a coverage/construction requirement that could trigger automatic termination for failure to

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<sup>19</sup> FCC 12M-39 (Rel. Aug. 7, 2012). The Glossary is actually a form of rule interpretation at best, or *ultra vires* rulemaking at worst. Interpretations under § 1.2 should be by the Commission or Wireless Bureau.

<sup>20</sup> See Enforcement Bureau’s Objections to Maritime’s First Draft Glossary, filed August 22, 2012; see also SkyTel-O’s Objections to Maritime’s First Draft Glossary, filed August 28, 2012.

comply.<sup>21</sup> That Petition disputes the Bureau's distinction between "construction" and "continuity of service," calling into question the specific benchmarks that must be met to comply with the construction requirements under Section 80.49(a).<sup>22</sup>

Moreover, as addressed in the referenced Petition, the Bureau has stringently applied a coverage requirement to the petitioner in other matters. The FCC cannot interpret its rules in one way with respect to one party and differently as to another party.<sup>23</sup> As a result, as noted in that matter, the FCC must apply a uniform "construction/coverage" requirement. Maritime cannot meet that standard in the instant cast as it has not provided continuity of coverage. As a result, as applied by the Commission, its system was not timely constructed.

## **VI. DELETION OR CANCELLATION DOES NOT RENDER ISSUE G MOOT WITH RESPECT TO SUBSUMED LICENSES**

The instant hearing is not limited to technical rule violations. Instead, as the HDO shows, the character and fitness of Maritime to hold any license is at issue.<sup>24</sup> Site-based licenses are not exempt from this requirement. The Judge must consider ALL of Maritime's licenses, even the Subsumed Licenses because they are relevant to a determination of Maritime's character and fitness to hold FCC licenses. For example, a review of the Subsumed Licenses could reveal willful violation of Commission rules, lack of candor before the FCC, misrepresentations or other evidence discrediting Maritime's character and fitness to hold Commission licenses. As a

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<sup>21</sup> Order at para. 5.

<sup>22</sup> See *In the Matter of Paging Systems, Inc. and Maritime Communications/Land Mobile LLC*, Requests to Find Automatic Termination of Licenses, Call Signs KYW912, WHW826, WQA212, WQA216, WQA227, Petition for Reconsideration of July 16, 2012 Order.

<sup>23</sup> *Windsor v. United States*, 833 F. Supp. 2d 394, 400 (S.D.N.Y. 2012) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("Equal protection requires the government to treat all similarly situated persons alike.")).

<sup>24</sup> See *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (FCC 11- 64), 26 FCC Rcd 6520 (2011).

result, Issue G must be pursued with respect to all subject Licenses, even those that have been voluntarily submitted for cancellation or deletion by Maritime.

## **CONCLUSION**

For the foregoing reasons, SkyTel-O respectfully requests that the Judge deny Maritime's Motion for Partial Summary Decision.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert H. Jackson".

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DATED: September 17, 2012

## **CERTIFICATE OF SERVICE**

I, Sherry Reese, herby certify that on this 17th day of September, 2012, a true copy of the Opposition to Motion for Partial Summary Decision was served upon the following in the delivery manner identified:

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/s/  
\_\_\_\_\_  
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## DECLARATION

1. My name Danny E. Ruhl. I am an adult resident citizen of Mississippi and am over 21 years of age. I am competent to testify as to the matters set forth in this declaration.

2. I am an attorney at Copeland, Cook, Taylor & Bush, P.A. ("CCTB"), the law firm representing Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC, Environmental LLC, Intelligent Transportation & Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, "SkyTel") in connection with the Chapter 11 bankruptcy case (Case No. 11-13463-DWH) (the "Bankruptcy Case") of *Maritime Communications/Land Mobile LLC* ("Maritime") which is pending in the United States Bankruptcy Court for the Northern District of Mississippi (the "Bankruptcy Court"). I am one of the attorneys at CCTB who has been personally and actively involved in the Bankruptcy Case.

3. On May 24, 2012, SkyTel filed in the Bankruptcy Case a *Motion for an Order Directing the (I) Rule 2004 Examination of Nation's Capital Archives Storage Systems, (II) Related Production, Inspection, and Copying of Documents, and (III) Preservation of Certain Documents in the Interim* (the "Motion," Dkt. #469<sup>1</sup>). A copy of the Motion, without exhibits, is attached as **Exhibit A** hereto.

4. The Bankruptcy Court granted the Motion in part and, on June 6, 2012, entered an *Order on Motion of SkyTel for an Order Directing the (I) Rule 2004 Examination of Nation's Capital Archives Storage Systems, (II) Related Production, Inspection, and Copying of Documents, and (III) Preservation of Certain Documents* (the "Preservation Order," Dkt. #491). A copy of the Preservation Order is attached as **Exhibit B** hereto.

5. Pursuant to the terms of the Preservation Order, and as discussed in more detail therein, certain physical documents which are described in the Motion -- and which are referred

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<sup>1</sup> Docket number references herein are to the docket of the Bankruptcy Case, unless stated otherwise.

to in the Motion, in the Preservation Order, and herein as the “Boxed Documents” -- were to be preserved in electronic format by a bonded copier selected by SkyTel, and were not to be accessed or reviewed by any person or entity (other than the copier and Nation’s Capital Archives Storage Systems, or “NCASS”<sup>2</sup>) until such time as the preservation work was completed.

6. On August 6, 2012, the United States District Court for the District of New Jersey (the “District Court”), which is handling a civil action styled as *Warren Havens, et al., v. Mobex Network Services LLC, et al.* (Civil Action No. 2:11-cv-00993-KSH-PS) (the “District Court Action”), entered a pretrial scheduling order (the “Scheduling Order,” District Court Dkt. #94). The Scheduling Order provided, among other things, that Mobex<sup>3</sup> was to provide certain supplemental discovery responses (including, as I understand it, supplemental production of documents included among the physical Boxed Documents) by either September 14 or 17, 2012. The Scheduling Order also provided that the plaintiffs to the District Court Action (i.e., SkyTel) were to take whatever steps they deemed appropriate to gain access to the physical Boxed Documents that are the subject of the Preservation Order so as, as I understand it, to allow the supplemental production to proceed. A copy of the Scheduling Order is included with **Exhibit C** hereto.

7. It is my understanding that the physical Boxed Documents have now been preserved to electronic format by the copier, and are at the storage facilities of NCASS. Further, a hard drive, which I understand contains the electronically preserved documents, has been deposited with the Bankruptcy Court.

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<sup>2</sup> This is the storage facility where I understand the Boxed Documents were and are now located.

<sup>3</sup> Which I understand to refer to Mobex Network Services, LLC and Mobex Communications, Inc. -- two defendants to the District Court Action, hereinafter collectively referred to herein as “Mobex.”

8. On September 7, 2012, and as more specifically described in the subject e-mails: (a) SkyTel's District Court Action counsel advised Mobex's District Court Action counsel by e-mail that the electronic preservation of the Boxed Documents under the Preservation Order had been completed, and that there was no impediment to Mobex's District Court Action counsel accessing and reviewing the physical Boxed Documents so as to comply with the District Court's Scheduling Order; and (b) Mobex's District Court Action counsel responded in part by insisting that the Preservation Order may still be read to prohibit access to the physical Boxed Documents, and by requesting SkyTel's counsel to seek confirmation from the Bankruptcy Court on that point. A copy of the aforementioned e-mails is included with **Exhibit C** hereto.

9. Accordingly, on September 12, 2012, SkyTel filed a *Motion for Expedited Telephonic Status Conference or Reconvened Hearing Regarding NCASS Preservation Order* (the "Motion for Reconvened Hearing," Dkt. #644) in the Bankruptcy Case. In the Motion for Reconvened Hearing, SkyTel requested an expedited telephonic status conference or reconvened hearing on the Preservation Order -- with participation by Mobex's District Court Action counsel (who was served with a copy of the motion by e-mail) -- for purposes of obtaining confirmation from the Bankruptcy Court that the Preservation Order is no longer an impediment to Mobex accessing and reviewing the physical Boxed Documents (as opposed to the electronically preserved version of those documents) so as to comply with the District Court's Scheduling Order. A copy the Motion for Reconvened Hearing, with exhibits, is attached as **Exhibit C** hereto.

10. Also on September 12, 2012, Mobex's District Court Action counsel filed a motion seeking leave to withdraw as counsel therein (the "Motion to Withdraw," District Court Dkt. # 108).

11. On September 13, 2012, the Bankruptcy Court addressed the Motion for Reconvened Hearing with SkyTel's and Maritime's Bankruptcy Case counsel. After discussing and considering the substance of that motion and the relief requested by SkyTel therein, after being advised about the Motion to Withdraw, and without any objection from Maritime's Bankruptcy Case counsel, the Bankruptcy Court directed SkyTel's Bankruptcy Case counsel: (a) to prepare an Order clarifying that, in light of the completion of the electronic preservation of the physical Boxed Documents under the terms of the Preservation Order, the Preservation Order no longer serves to restrict access to the physical Boxed Documents and is therefore no longer any impediment to discovery taking place consistent with the terms of the District Court's Scheduling Order; (b) to circulate the Order to Maritime's Bankruptcy Case counsel for signature; and (c) to thereafter submit the Order to the Bankruptcy Court for consideration and entry.

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 17<sup>th</sup> day of September, 2012.

  
DANNY E. RUHL

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI

FILED/ACCEPTED

SEP 17 2012

Federal Communications Commission  
Office of the Secretary

IN RE:

MARITIME COMMUNICATIONS/  
LAND MOBILE, LLC,

Debtor.

CASE NO. 11-13463-DWH

CHAPTER 11

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**MOTION OF SKYTEL FOR AN ORDER DIRECTING THE  
(I) RULE 2004 EXAMINATION OF NATION'S CAPITAL ARCHIVES STORAGE  
SYSTEMS, (II) RELATED PRODUCTION, INSPECTION AND COPYING OF  
DOCUMENTS, AND (III) PRESERVATION OF CERTAIN DOCUMENTS IN THE  
INTERIM, AND REQUEST FOR EXPEDITED TELEPHONIC HEARING**

Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC (formerly called Telesaurus, VPC LLC), Environmental LLC (formerly called AMTS Consortium LLC), Intelligent Transportation & Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, "SkyTel")<sup>1</sup> move this Court to enter an order pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure ("Rule 2004") and other applicable law: (i) directing the oral examination of Nation's Capital Archives Storage Systems ("NCASS"), through a designated representative or representatives, regarding, in general, the Debtor's acts, conduct, property, leases, joint ventures, contracts, liabilities, financial condition, and/or other matters which affect or may affect the administration of the Debtor's estate, the operation of any business by the Debtor, the source of any money or property acquired or to be acquired by the Debtor for purposes of formulating or consummating a plan, and any other matter relevant to the case or to formulation/consummation of a plan, and regarding, most specifically, the various documents discussed in this Motion and Exhibit D hereto, and any dealings between the Debtor, NCASS, or

<sup>1</sup> The SkyTel entities listed here are separate legal entities, all managed by Warren Havens, and for the purposes of this bankruptcy and in related proceedings before the Federal Communications Commission ("FCC"), pursue certain common interests.



others in connection with those documents (collectively, the "Examination Topics"); (ii) directing the inspection and copying -- by a bonded copier, at the expense of SkyTel,<sup>2</sup> and for the benefit of SkyTel and the bankruptcy estate -- of certain boxes of documents described below which are in the possession, custody, or control of NCASS (the "Boxed Documents"), (iii) directing the production by NCASS of certain other documents described below and in Exhibit D hereto that are related to the dealings between the Debtor, NCASS, or others in connection with, *inter alia*, the Boxed Documents, and (iv) directing that the Boxed Documents shall be preserved by NCASS, and not accessed by any other person or entity other than NCASS and the bonded copier, until that bonded copier completes its work described herein. In support thereof, SkyTel respectfully states as follows:

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2).
2. Venue is proper in this Court pursuant to 28 U.S.C. §§1408 and 1409. The relief requested herein is predicated on Bankruptcy Rule 2004 and Local Rule 2004-1, and other applicable law.
3. On August 1, 2011, the Debtor commenced the above-captioned bankruptcy case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.
4. The Debtor is operating its businesses and managing its property as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case.
5. SkyTel is a creditor and party-in-interest herein. *See e.g.* Claim No. 69; 11 U.S.C. § 1109.

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<sup>2</sup> If this proves valuable to the estate, then SkyTel may seek to recover some or all of the associated costs upon an appropriate further motion.

6. The Boxed Documents -- which are currently being stored in approximately 93 to 101 boxes at the Virginia facility of NCASS (*see Exhibit E*) -- directly relate to certain of the Debtor's alleged assets. More specifically, the Boxed Documents relate to the site-based FCC licenses, and related radio spectrum and radio equipment (collectively, the "Site-Based Licenses") that the Debtor allegedly purchased from Mobex Network Services, LLC ("Mobex") in or around 2005.

7. The Boxed Documents contain information highly relevant to, among other things, the issue of whether or not Mobex timely constructed and properly operated the Site-Based Licenses prior to the sale of its alleged assets to the Debtor. If Mobex did not do so in connection with some or all of the Site-Based Licenses, then those subject licenses purportedly sold to the Debtor automatically terminated by operation of law prior to the sale, and are not valid assets of the estate. In the case of such a finding, the Debtor may have valuable claims to assert against Mobex, as the seller of the licenses, for, among other possible things, breach of representations and warranties, fraud, rescission, and other remedies and associated damages that would benefit the estate.

8. Based on information and believe, the Boxed Documents also relate to a claim that was asserted by the Debtor, denied by the FCC, and currently subject to an appeal by the Debtor before the FCC,<sup>3</sup> for a refund of \$1,301,230.00 that the Debtor seeks for alleged past payments made by, but that allegedly did not have to be made by, its predecessor holder of the subject site-Based Licenses, Mobex, as a CMRS ("Commercial Mobile Radio Service") operator

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<sup>3</sup> This proceeding is described in: *In the Matter of ... Request for Review by Waterway Communication System, LLC and Mobex Network Services, LLC of a Decision of the Universal Service Administrator*, DA 10-1013, 25 FCC Rcd 7170; 2010 FCC LEXIS 3404; released June 4, 2010. See also FCC DA 08-1971, in which the refund amount sought is stated: f \$1,301,230. A copy in FCC records is at: [http://www.universalservice.org/\\_res/documents/about/pdf/fcc-orders/2008-fcc-orders/DA-08-1971.pdf](http://www.universalservice.org/_res/documents/about/pdf/fcc-orders/2008-fcc-orders/DA-08-1971.pdf).



of the subject licenses (the Debtor has alleged, *inter alia*, that these payments did not have to be made by Mobex because the business was actually conducted as a PMRS ("Private Mobile Radio Service")). The Boxed Documents may contain "new" evidence in support of the refund claim, and, if that claim has merit, may thereby further benefit the estate. On the other hand, if the Boxed Documents demonstrate that the refund claim lacked a valid basis, then the Debtors' claims against Mobex, discussed above, may increase to the benefit of the estate.<sup>4</sup>

9. It should be noted that there is an unresolved question regarding which entity, if any, has a current right to claim ownership of the Boxed Documents.

10. Indeed, while the Debtor has represented to the FCC and others that the Boxed Documents relate to the Site-Based Licenses it allegedly purchased from Mobex, the Debtor has also represented: (i) that it had no interest in retaining those Boxed Documents following the subject purchase; and (ii) that it (and Mobex) believed those Boxed Documents had been destroyed due to Mobex's failure to pay outstanding storage fees.<sup>5</sup>

11. What is clear, however, is that the Boxed Documents are currently in the possession, custody, or control of NCASS.<sup>6</sup>

12. What is likewise clear is that SkyTel is entitled: (i) to examine NCASS to obtain information within the scope of Rule 2004(b), including information regarding the Boxed Documents, the other documents described in Exhibit D, and any dealings between the Debtor,

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<sup>4</sup> Martime's purchase of the Site-Based Licenses from Mobex included all related assets, including this refund claim. This is reflected in various FCC documents, including footnote one of the FCC Order, DA 08-1971, the link to which is set forth in the preceding footnote.

<sup>5</sup> See e.g., Declaration of David Predmore (who was, along with John Reardon, a Mobex Officer), at ¶ 5, a copy of which is attached hereto as Exhibit A; see also Debtor's Opposition to Petition to Dismiss in FCC proceeding, at p. 3, and copy of which is attached hereto (without exhibits) as Exhibit B. The purported belief of the Debtor and Mobex in this latter regard apparently continued until SkyTel was successful very recently in locating the Boxed Documents at NCASS. See Exhibit F hereto.

<sup>6</sup> This has been confirmed by NCASS in writing to SkyTel counsel. See Exhibit E. This has also been reported by FCC regulatory counsel for the Debtor, Robert Keller, to the FCC. See Exhibit F.